

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

TENET HEALTH SYSTEM HOSPITALS, INC.
d/b/a GARFIELD MEDICAL CENTER¹

Employer

and

Case 19-RC-14044
(formerly Case 21-RC-20288)

AMERICAN FEDERATION OF NURSES,
LOCAL 535, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, CLC

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, part-time, and per diem registered nurses employed by the Employer at its 525 North Garfield Avenue, Monterey Park, California, facility including charge nurse and relief charge nurses; but excluding all registry nurses, traveling nurses, visiting nurses, guards and supervisors as defined by the Act, and all other employees.

¹ The name of the Employer appears as corrected at hearing.

The Employer is engaged in the operation of an acute care hospital located at 525 North Garfield Avenue, Monterey Park, California. Petitioner seeks a unit of all registered nurses (RNs) employed in the hospital.² The sole issue in the hearing is the supervisory status of charge nurses. There are about 58 charge nurses working in about 18 different departments or areas, and there are about 380 non-charge nurses in the Unit.

The hospital operates 24 hours a day, seven days a week, and most of the departments are staffed accordingly. RNs generally work three 12-hour shifts or five 8-hour shifts, per week. Twelve-hour shifts are 7:00 a.m. to 7:00 p.m., and 7:00 p.m. to 7:00 a.m. Eight-hour shifts are 7:00 a.m. to 3:30 p.m.; 3:00 p.m. to 11:30 p.m.; and 11:00 p.m. to 7:30 a.m., with some exceptions. In departments which run on 12-hour shifts, there are two day-shift and two night-shift charge nurses, with a relief charge nurse³ on the seventh day. In departments which run on 8-hour shifts, there are generally three charge nurses, one per shift five days a week, with relief charge nurses on the weekends. On occasion, a rank-and-file nurse is designated to act as charge nurse for a shift. The operating room, PACU (recovery room), and emergency room have atypical shift hours.

The Employer offered evidence department by department with respect to the duties and responsibilities of the charge nurses. However, the record as a whole reveals that there are consistent overall patterns, practices, and policies in effect. Each department has a director who typically is present in the facility for about eight hours a day, five days a week, and is available by pager at all other times.⁴ This is the person to whom the charge nurses report. Under the director of peri-operative services are four areas: operating room, GI lab, PACU and outpatient surgery. Both PACU and outpatient surgery have managers as well as charge nurses. The parties stipulated that the directors of the departments and the managers of PACU and outpatient surgery are statutory supervisors, a total of 10 individuals.

Charge nurses spend most of their work time engaged in direct patient care.⁵ They are paid a differential of five percent for each shift they work as charge nurse. This is also true of relief charge nurses, who fill in as charge on weekends or otherwise as needed. The nurse must note "CN" on her time card in order to get the differential; this is true of regular "permanent" charge nurses as well as relief charge nurses. A regular charge nurse who might work a shift as a non-charge nurse does not get the five percent differential for that shift. This can occur, for example, if she works an extra shift to fill in for an absentee.

Charge nurses assign patients to nurses. This is generally done on each shift. In some departments, the charge nurse makes the assignments for the next shift. In other departments, the charge nurse makes the assignments for her own shift at the beginning of the shift. In some

² The parties stipulated that registry nurses, traveling nurses, and visiting nurses are excluded from the unit.

³ Neither party took, or was asked to take, any position with respect to the supervisory status of relief charge nurses.

⁴ Departmental directors who testified said that they receive telephone calls during off hours only infrequently.

⁵ An exception is Labor and Delivery. The manager of this department testified that the charge nurse normally does not engage in patient care unless the unit is very busy, although the charge nurse does make the initial assessments of incoming patients before assigning the patients to other nurses.

departments, such as Labor and Delivery, the charge nurse makes the assignment when the patient arrives. Assignments are made on the basis of patient acuity, special language needs of patients, and proximity of patients to one another. Patient acuity is determined by the treatment prescribed by the physician.⁶ There is an established matrix by which the ratio of nurses to patient acuity is determined; that is, whether the ratio should be one-to-one, one-to-two, and so on. Some of the department directors testified that the skill level of the nurses is a further consideration in making patient assignments, but there is little specific evidence in this regard. It appears to be the practice to assign patients requiring more complex treatments to more experienced nurses, rather than to nurses who are new in a department and whose range of skills are as yet unproven to the charge nurse. There is no evidence that the skill levels of the various nurses vary significantly, or that consideration of nurses' skill levels is regularly a significant factor in assigning patients.

In most departments, charge nurses fill out evaluation forms for the other nurses or other employees on their shifts. The forms are standardized, multi-page forms which call for the evaluator to give the employee numerical ratings from 1 to 4 on numerous criteria covering work performance and personal characteristics. In addition, the evaluator can also make a comment regarding each criterion. The numbers are added together for a total score. The total score is used in some unspecified way by charge nurses' supervisors in the latter's determination of whether the employee receives a wage increase, and presumably how much. There is no evidence with respect to the relationship between the total score and any potential wage increase. Generally, the charge nurse signs the evaluation form after completing it, and discusses it with the relevant employee before handing it on to the department director. The director reviews the form and is free to make changes. Some directors discuss changes with the charge nurse; some do not. The same evaluation form and procedure is used to evaluate probationary employees at the completion of three months' probation. Departmental directors testified that they almost always agree with the charge nurses' assessments⁷ of employees. There is no specific evidence that any employee has ever been granted a wage increase or been terminated at the end of the probationary period solely on the basis of a charge nurse's evaluation of that employee, without any independent investigation by higher authority.

Charge nurses have some responsibility with respect to scheduling nurses on their shifts. Scheduling is generally a matter of individual nurses signing up for the shifts that they want to work. If there is an imbalance, such as too many nurses signed up for one shift and not enough for another shift, the charge nurse brings that to their attention and asks them to cooperate in resolving the problem. There is no evidence that charge nurses have authority to assign shifts to nurses without regard for the nurses' preferences.⁸ If an open spot on the schedule cannot be filled, the director can decide to call in a registry or per diem nurse for that shift, but the fact that there is a slot - a decision determined by application of the formula - means it must be filled.

It is hospital policy that any nurse must complete her work, including paperwork, for her shift before leaving for the day. Sometimes nurses need to stay overtime in order to do this. In some departments, the nurse simply stays and notes the overtime on her time card. In other

⁶ The primary care nurse, that is, the nurse assigned to the patient, can revise the patient's acuity level in accordance with changes in the patient's status.

⁷ The assessments contain no recommendations for action.

⁸ Many of the nurses also work in other area hospitals, and are accommodated in this regard.

departments, higher authority must be notified that the nurse is staying over. There is no evidence that any nurse has ever been told by a charge nurse or other authority not to stay in these circumstances.

At times in a department, the patient census may be low, so that a nurse could be let go early. Each department keeps a rotation list for this purpose, and the nurses thereby take turns leaving early. However, the list is regularly deviated from, in that a particular nurse may offer to leave even though it is not her turn. The charge nurse has authority to ask⁹ the nurse to stay, perhaps because of language needs of a particular patient. For similar reasons, a charge nurse can also ask that another nurse leave in place of the nurse whose turn has come up on the rotation list. Further, patient census in a department may increase so that the charge nurse, using the applicable matrix (formula), determines that an additional nurse is needed. The charge nurse notifies Nursing Operations, usually by contacting the secretary of that area, and Nursing Operations calls in a nurse, who may be a “floater” from another area of the hospital, a per diem or registry nurse, or a regularly employed nurse called in to work on overtime.

In Labor and Delivery, charge nurses participate with the department director in interviewing candidates for hire. In the Hemodialysis unit, the charge nurse interviews job applicants first, and then the director interviews the applicant. The charge nurse in part performs a screening function, and may tell the director not to bother interviewing a person. In the Operating Room, the day shift charge nurse has participated along with the director in interviewing job candidates. In “CSU”,¹⁰ charge nurses participate with the director in interviewing job candidates. The directors of all of the foregoing departments testified that they almost always agree with the charge nurses’ recommendations with respect to hire. There is no evidence that any employee has ever been hired solely on the basis of a recommendation by a charge nurse, without any independent assessment of the job candidate by higher authority. In all other departments, interviewing/hiring is performed without the participation of charge nurses. No charge nurse interviews on her own.

Charge nurses have authority to resolve “problems” which arise day-to-day on their shifts, including complaints from patients or patients’ families, or from doctors, or disputes between employees. There is no specific evidence with respect to any such problems or complaints that have been resolved by charge nurses. However, theoretical examples were offered, such as a nurse complaining that her workload was too heavy because of the high acuity level of her patients; or some other unspecified complaint by a nurse about an assignment; or some unspecified dispute between nurses, or between a nurse and another employee. If the charge nurse is unable to resolve the problem - that is, to pacify the parties - she can refer the problem to the departmental director. The charge nurse can, for example, readjust the patient assignments if one nurse seems overburdened, or can reassign a nurse away from a patient to resolve complaints from the patient, the patient’s family, or the physician. There is no evidence that the Employer has any established procedure equivalent to a contractual grievance procedure.

Charge nurses also have authority to verbally counsel employees. There is no specific evidence of such verbal counseling by any charge nurses. There is no evidence that any record is kept of such counseling. The director of the acute rehabilitation unit and pediatrics testified that her charge nurses have authority to sign written warnings, but there is no evidence that any such

⁹ The charge nurse cannot order someone to stay.

¹⁰ Undefined in the record.

charge nurse has ever issued a written warning, nor any other specific evidence enhancing the director's generic and limited testimony. Further, the director testified that she can add to or delete from written warnings signed by charge nurses. There is no evidence that, even if charge nurses have signed written warnings, they did so without prior consultation with and approval by the director, or that the director approved issuance of a written warning without any independent investigation. There are no written warnings signed by charge nurses in evidence. Other departmental directors testified that charge nurses in their departments do not have any authority to issue written warnings. In any event, there is no evidence that the Employer has any progressive disciplinary system, such that a "written warning" forms a required prerequisite to subsequent increased discipline, such as suspension, for repeated offenses.

Conclusions.

Section 2(11) of the Act defines a "supervisor" as:

. . .[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

There is no evidence or contention that the charge nurses have any authority to transfer, suspend, lay off, recall, promote, or discharge employees.

In all departments, the charge nurses assign patients to nurses. In circumstances similar to those found here, the Board has found that charge nurses' daily assignments did not require any independent judgment that went beyond the professional judgment exercised by all RNs, and that such assignment did not involve the independent judgment required of a supervisor. *Providence Hospital*, 320 NLRB 732 (1996). In particular, here it is a routine matter to assign patients to nurses who are able to communicate with patients in their language; to assign patients to nurses who already have patients in proximity; to assign more experienced nurses to patients requiring more complex treatments, and to determine the ratio of nurses to patients according to an established formula. There is no specific evidence in the record demonstrating that any independent judgment is required in these latter assignment situations.

In most departments, the charge nurses complete written evaluations of other employees. Mere completion of evaluations does not confer supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB No. 55 (1999). "Evaluation" is not one of the statutory indicia of supervisory status. The Board has also said that, "authority to evaluate work performance is not evidence of supervisory status if it is *subject to* independent investigation and decision by others." [Emphasis added.] *Gem Urethane Corp.*, 284 NLRB 1349 (1987). In *Bayou Manor Health Center*, 311 NLRB 955 (1993), the Board found LPNs to be supervisors where they evaluated employees in a manner similar to that found here: no higher authority reviewed the numerical scores awarded by the LPNs, specific percentage pay increases corresponded to various overall scores, and the scores the employees received on their evaluations directly determined the amount of pay increases they received. The instant case is clearly distinguishable from *Bayou Manor*. Here, the numerical scores awarded by the charge nurses are reviewed by higher authority, and are sometimes changed by that authority. Further, here there is no evidence at all with respect to the relationship between the scores awarded on the evaluations and any pay increases received by employees, other than conclusionary testimony that pay increases are "tied" (in some unspecified

way) to the scores. “Conclusionary statements made by witnesses in their testimony, without supporting evidence, does not establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Thus the record fails to establish that the charge nurses have any independent authority to reward employees, or to effectively recommend reward.

The evidence here regarding the charge nurses’ responsibility with respect to scheduling employees does not establish that the charge nurses are required to exercise any independent judgment in the process. Scheduling is merely a matter of making sure that all shifts are sufficiently staffed, following the staffing-level formulas; in most cases any conflicts are worked out among all of the nurses on a shift. There is no evidence that charge nurses on their own have any authority to order an employee to work a certain shift, nor is there any evidence that are significant variations from one scheduling period to the next. The evidence does not support any conclusion that such scheduling as is actually done by the charge nurses is anything more than a routine, clerical task.

Likewise, there is no evidence that any approval of overtime given by charge nurses, or any designation of an employee to leave work early, or determination that an additional nurse needs to be called in, is anything other than a routine, clerical function carried out in accordance with hospital policy that nurses complete their work before leaving at the end of shift, and that the number of nurses on duty be appropriate to the number of patients, in accordance with established guidelines. In *Providence Hospital*, supra, at 732, the Board said that, “Assessing whether there is a high or low patient census warranting calling in extra help or letting staff off early is not significantly more complicated than counting the number of patients.” I.e., it is a routine, clerical matter not requiring the use of any independent judgment.

The evidence regarding the charge nurses’ authority to resolve complaints is merely conclusionary, lacking in any specific examples of any charge nurse having resolved any complaint presented to her by an employee. It appears that charge nurses are expected to do their best to pacify complainants, but there is no evidence that charge nurses have any authority to make any adjustments in any employee’s wages or working conditions, other than to make reassignments of patients. There is no evidence that the Employer has any established “grievance” procedure naming charge nurses as the first step, nor otherwise any evidence that the complaint resolution carried out by charge nurses rises to the level of statutory authority to resolve grievances. The Board has found that limited authority to resolve “squabbles” between employees or other minor problems is insufficient to warrant a finding of statutory authority to resolve grievances. *Saint Francis Medical Center West*, 323 NLRB 1046 (1997); *Bay Area-Los Angeles Express*, 275 NLRB 1063 (1985). Without specific, detailed examples of actual complaints resolved by charge nurses, it is simply not possible to make any finding here that they have statutory authority to resolve grievances.

The charge nurses’ authority to engage in “verbal counseling” - and even, in some cases, perhaps to at least sign written warnings - has not been shown to amount to statutory authority to discipline. There is no evidence that any verbal or written admonishments given by charge nurses to employees have any effect on job status or tenure, such as in a fixed, graduated discipline system. *Northcrest Nursing Home*, 313 NLRB 491 (1993). Moreover, there is no specific evidence in the record of any verbal counseling or written warnings given by charge nurses.

The participation of charge nurses in Labor and Delivery, Hemodialysis, Operating Room, and CSU in interviewing job candidates does not amount to effective recommendation for hire. Authority to effectively recommend means that “the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation is followed.” *ITT*

Lighting Fixtures, 265 NLRB 1480 (1982). In all departments in which charge nurses interview job applicants, they do so alongside the director of the department, or the director interviews the candidate separately at another time. Thus, the record does not establish that any charge nurses have authority to effectively recommend hiring. “Mere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish Section 2(11) supervisory authority.” *North General Hospital*, 314 NLRB 14 (1994). There was some generic testimony that some charge nurses culled out certain applications, which were rejected, but no testimony about exactly how that happened. I note in any event that rejection of applicants for failing to meet qualifying minimums does not constitute supervisory authority. *Cassis Management Corporation*, 323 NLRB 456 (1997).

No specific issue as to authority of the charge nurses to “responsibly direct” was raised at hearing. Nevertheless, it must be considered because it is implied by the record. The Board’s traditional approach to this issue is to analyze “whether the direction is done with independent judgment.” *Providence Hospital*, *supra*, at 729. In *Providence*, at 728, fn. 25, the Board noted that, “The basis for this approach is not that the terms ‘responsibly to direct’ and ‘independent judgment’ are synonymous, but that an employee who exercises independent judgment in a non-routine manner in directing other employees is likely to have been delegated substantial authority by the employer to carry out directions to those employees.” The evidence in this record, with respect to all the various ways in which charge nurses “direct” other employees, as set forth above, does not establish that in doing so they are required to exercise any independent judgment. The Board distinguishes “supervisors who share management’s power or have some relationship or identification with management, from skilled non-supervisory employees whose direction of other employees reflects their superior training, experience, or skills. ... The Board has also recognized that making decisions requiring expert judgment is the quintessence of professionalism; mere communication of those decisions and coordination of their implementation do make the professional a supervisor.” *Providence Hospital*, *supra*, at 729.

The Board uses secondary indicia in assessing the likelihood that certain individuals are supervisors. Secondary indicia do not, however, transform an individual who lacks any of the statutory indicia of supervisory status into a supervisor. *Northcrest Nursing Home*, 313 NLRB 491 (1993). Conversely, secondary indicia can also indicate that it is unlikely that certain individuals are supervisors, although, of course, where the individuals at issue clearly possess any of the statutory indicia, secondary indicia do not negate supervisory status. Secondary indicia, in the end, are a kind of corroboration of a decision, or perhaps a red flag to analyze a particular individual very closely.

Here, secondary indicia suggest that it is unlikely that the charge nurses are statutory supervisors. A finding that charge nurses are statutory supervisors would result in the rather high ratio of at least one supervisor for every 5.5 employees. During the larger proportion of time on the day shift on weekdays, departmental directors are present in the facility and readily available for consultation. Further, the directors are readily available at all other times by pager. The fact that they are rarely called upon does not dilute the significance of their availability. Charge nurses are paid the five percent differential only for those shifts on which they are performing as charge nurse, and rank-and-file nurses who perform as charge nurse on a shift also receive the same five percent differential for that shift. Patient acuity, which is a factor in the assignment of patients to nurses, is sometimes determined by the rank-and-file primary care nurse.

Thus, I conclude that on this record¹¹ the charge nurses¹² herein are not supervisors within the meaning of Section 2(11) of the Act.

There are approximately 438 employees in the Unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by AMERICAN FEDERATION OF NURSES, LOCAL 535, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full

¹¹ The burden of proving supervisory status rests on the party contending that such status exists. *Tucson Gas & Electric Company*, 241 NLRB 181 (1979); *Midland Transportation Co.*, 304 NLRB 4 (1991). In this regard, the Employer herein has not met its burden.

¹² Since the charge nurses are not statutory supervisors, it follows that the relief charge nurses - about whom there is a little specific testimony - are not statutory supervisors, either. In any event, such has not been shown. Accordingly, I shall include them in the Unit.

names and addresses of all the eligible voters, must be filed by the Employer **with the Regional Director for Region 21** within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the **Regional Office, National Labor Relations Board, Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017-5449**, on or before December 28, 2000. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (213) 894-2778. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by January 4, 2001.

DATED at Seattle, Washington, this 21st day of December, 2000.

/s/ PAUL EGGERT

Paul Eggert, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

177-8580-8060